### National Labor Relations Board



# Weekly Summary of NLRB Cases

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Cargill Nutrena, Inc. (15-UD-26; 344 NLRB No. 139) Montgomery, AL July 21, 2005. The Board granted the Employer's request for review of the Regional Director's dismissal of this "decertification" petition as it raises substantial issues warranting review with regard to whether the petition was timely filed. It concluded that the petition was timely mailed under the Board's "Postmark Rule" and should be processed and accordingly, remanded the case to the Regional Director for further appropriate action. The Union involved is the Retail, Wholesale and Department Store Union. [HTML] [PDF]

The employer marked the union deauthorization (UD) box on the petition. The Regional Director determined that the Petitioner seeks a decertification election (RD). The Board's analysis is premised on its treatment as an RD petition since it would not apply to an actual UD petition because contract-bar principles are not applicable to UD cases.

The 60- to 90-day "open" period for filing a petition ran from May 3 to June 1, 2005. Upon receipt of the petition on June 2, the Regional Director dismissed the petition as untimely filed because it was not received in the Regional Office during the "open" period before the contract's expiration date.

The Employer contended that the petition was postmarked on May 25, 2005 and that, pursuant to Section 102.111(b) of the Board's Rules and Regulations, the petition should be considered timely filed because it was postmarked earlier than the June 1 due date. The Board agreed that if the petition was postmarked prior to the end of the open period, it is timely filed, citing *John I. Haas, Inc.*, 301 NLRB 300 (1991), that amended Section102.11(b) to bring representation petitions within the postmark rule. It wrote:

Thus, the Board in *John I. Haas, Inc.*, as codified in amended Section 102.111(b), clearly stated its intention to apply the 'postmark' rule to representation petitions, and no longer to require that the timeliness of representation petitions be governed by the date on which they are received in the Regional Office.

Thus, if, as the Employer contends, the petition in this case was postmarked on May 25, 2005, we would find, contrary to the Regional Director, that the petition was timely filed because it was postmarked earlier than the June 1 due date, even though it was received by the Region in the insulated period after the due date.

(Chairman Battista and Members Liebman and Schaumber participated.)

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Ellison Media Co. (28-CA-19026; 344 NLRB No. 136) Phoenix, AZ July 20, 2005. The Board reversed the administrative law judge and found that the Respondent violated Section 8(a)(1) of the Act by promulgating an unlawfully broad no-communication rule and by threatening employees with discharge for violating that rule. [HTML] [PDF]

At the urging of employee Mary Christie, employee Daniel Miller confronted supervisor Joel Gable about a sexually suggestive comment that Miller thought Gable had made. Miller drafted an e-mail to Christie about the confrontation, but he mistakenly sent the e-mail to Gable. Holding a copy of the e-mail, Gable told Miller that "this needs to stop now" and that if he saw Miller and Christie gossiping anymore, Miller would lose his job. He directed the same order to Christie. The judge found that the order was a lawful prohibition of unprotected gossip, and therefore the threat of discharge for violation of the order was similarly lawful.

In reversing the judge, the Board wrote that the judge erred in failing to consider Gable's statement in its full context, but instead viewing it as referring solely to what the judge found was the unprotected gossip reflected in Miller's e-mail. It found Gable's statement that "this needs to stop now," uttered while holding Miller's e-mail, was unlawful because it reasonably tended to interfere with Miller's free exercise of his Section 7 rights to discuss sexual harassment complaints with other employees.

Chairman Battista and Member Schaumber, with Member Liebman concurring in the result, affirmed the judge's dismissal of the allegation that Christie's discharge violated Section 8(a)(1). Chairman Battista and Member Schaumber agreed with the judge that the General Counsel failed to establish that protected concerted activity was a motivating factor in Christie's discharge because he did not show that the Respondent had knowledge of that activity. While Member Liebman assumed arguendo that the General Counsel satisfied his initial burden under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F. 2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), she concluded that the Respondent met its burden under *Wright Line* of establishing that it would have discharged Christie even absent her protected concerted activity.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Mary E. Christie, an Individual; complaint alleged violation of Section 8(a)(1). Hearing at Phoenix, Feb. 24-26, 2004. Adm. Law Judge Thomas M. Patton issued his decision Sept. 29, 2004.

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Liberty Source W, LLC and/or Trafford Distribution Center, its alter ego (6-CA-33661, 33729; 344 NLRB No. 137) Trafford, PA July 22, 2005. No exceptions were filed to the administrative law judge's findings that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide terminated unit employees with severance pay, accrued vacation pay, and compensation to which those employees were entitled under the existing collective-bargaining agreements with the Federation of Independent Salaried Unions and Electrical Workers IUE Local 601. [HTML] [PDF]

The Board found merit in the General Counsel's exception to the judge's finding that the record evidence did not demonstrate that the Respondent failed to pay terminated employees' health care benefits, security and protection plan benefits, and commissions required by the

applicable contracts and failed to properly remit funds to employees' pension funds. It modified the conclusions of law, remedy, recommended Order, and notice accordingly.

In support of his finding that Trafford Distribution Center is the alter ego of Liberty Source W, LLC, the judge found that Trafford and Liberty Source had substantially identical ownership, management, supervision, business purposes, operations, equipment and premises, and customers. He concluded that the purpose behind the creation of Trafford was to avoid legal obligations under the Act.

Chairman Battista adhered to his position that the General Counsel must show, inter alia, an intent to avoid legal obligations under the Act in order to prove alter ego status. See *Crossroads Electric, Inc.*, 343 NLRB No. 112, slip op. at fn. 2 (2004). However, recognizing that under extant Board law, unlawful motivation is not a necessary element of an alter ego finding, and in the absence of a three-member Board majority to overrule extant Board law, Chairman Battista concurred with his colleagues in the finding of alter ego status.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Federation of Independent Salaried Unions and Electronic Workers (IUE) Local 601; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Pittsburgh, July 19-20, 2004. Adm. Law Judge Paul Bogas issued his decision Nov. 4, 2004.

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John Pomaville d/b/a John Pomaville Plumbing (7-CA-47830; 344 NLRB No. 138) Lansing, MI July 22, 2005. In view of the Respondent's failure to comply with the requirements of a settlement agreement, the Board granted the General Counsel's motion for summary judgment and affirmed the complaint allegations. It found that the Respondent violated Section 8(a)(1) of the Act by advising employees that it did not want union activity in its shop, by directing employees to confirm in writing that they would not engage in union activity, and by conveying the impression to employees that their union activities were under surveillance; and violated Section 8(a)(3) and (1) by permanently laying off employees Tony Hernandez, George Urdiales, and Alfred Walters because of the employees' union sympathies. [HTML] [PDF]

The Respondent and Plumbers Local 333 entered into a settlement agreement, which was approved by the Regional Director and required the Respondent to, among other things: pay Hernandez \$5244 in backpay, pay Urdiales \$6293 in backpay, and pay Walters \$7800 in backpay, by no later than Friday, February 18, 2005. The Respondent has failed to remit any of the agreed-upon backpay amounts due employees under the settlement agreement and, pursuant to the terms of the noncompliance provision of the settlement agreement, the Regional Director reissued the complaint and the General Counsel filed a motion for summary judgment.

(Chairman Battista and Members Liebman and Schaumber participated.)

General Counsel filed motion for summary judgment April 22, 2005.

#### LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

*Teamsters Local* 287 (Granite Rock Co.) San Jose, CA July 14, 2005. 32-CB-5817-1; JD(SF)-52-05, Judge Jay R. Pollack.

JHP & Associates, LLC d/b/a Metta Electric (Electrical Workers [IBEW] Local 1) Saint Louis, MO July 13, 2005. 14-CA-28042, 28179; JD(SF)-51-05, Judge James L. Rose.

Allan's Bakery, Inc. (Bakery Workers Local 3) Brooklyn, NY July 19, 2005. 29-CA-26936; JD(NY)-30-05, Judge Steven Davis.

Dairyland USA Corp. and Food & Commercial Workers Local 348-S (Individuals) Bronx, NY July 19, 2005. 2-CA-35632, 35633, 2-CB-19388, 19389; JD(NY)-31-05, Judge D. Barry Morris.

Genesis, Inc. (Mine Workers Region 4) Troy, MT July 18, 2005. 19-CA-29449; JD(SF)-53-05, Judge Lana H. Parke.

Consolidated Bus Transit, Inc. and Teamsters Local 854 (Individuals) Brooklyn, NY July 21, 2005. 2-CA-34661, et al., 2-CB-19125, et al.; JD(NY)-32-05, Judge Eleanor MacDonald.

Cast-Matic Corp. d/b/a Intermet Stevensville (Auto Workers [UAW]) Stevensville, MI July 21, 2005. 7-CA-45550, et al.; JD-56-05, Judge Earl E. Shamwell Jr.

*Electrical Workers [IBEW] Local 827* (an Individual) Neptune, NJ July 22, 2005. 22-CB-9969; JD(NY)-33-05, Judge Steven Davis.

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## LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

(In the following cases, the Board considered exceptions to and adopted Reports of Regional Directors or Hearing Officers)

## DECISION AND DIRECTION [that Regional Director open and count ballots]

Farris Electric, Inc., San Francisco, CA, 32-RC-5327, July 20, 2005 (Chairman Battista and Members Liebman and Schaumber)

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(In the following cases, the Board adopted Reports of Regional Directors or Hearing Officers in the absence of exceptions)

#### DECISION AND CERTIFICATION OF REPRESENTATIVE

Vocational Services, Inc., Washington, DC, 5-RC-15835, July 18, 2005 (Chairman Battista and Members Liebman and Schaumber)

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(In the following cases, the Board granted requests for review of Decisions and Directions of Elections (D&DE) and Decisions and Orders (D&O) of Regional Directors)

Prince Telecom Holdings, Inc., Mount Vernon, NY, 2-RC-22988, July 20, 2005
(Chairman Battista and Member Schaumber; Member Liebman dissenting)
The Cajun Co., Inc., Lafayette, LA, 15-RC-8615, July 20, 2005 (Chairman Battista and Members Liebman and Schaumber)

Hilson & Fergusson, Inc. and HFH, Inc., Sarasota, FL, 12-RC-9118, July 20, 2005 (Chairman Battista and Member Schaumber; Member Liebman dissenting)

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(In the following cases, the Board denied requests for review of Decisions and Directions of Elections (D&DE) and Decisions and Orders (D&O) of Regional Directors)

R.L. McCarthy & Son, A Subsidiary of Atlantic Express Transportation Group, Inc., Brookfield, MA, 1-RC-21915, July 20, 2005 (Chairman Battista and Members Liebman and Schaumber)

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#### Miscellaneous Board Orders

ORDER [granting Intervenor's request for special permission to appeal from Acting Regional Director's determination to conduct the election by manual mail ballot and denying appeal on the merits]

*Pittsburgh Associates*, Pittsburgh, PA, 6-RC-12464, July 20, 2005 (Chairman Battista and Members Liebman and Schaumber)

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